In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 23.

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE MISSOURI-KANSAS-TEXAS RAILROAD, AN UNINCORPORATED ASSOCIATION,

Petitioner,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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The Petitioner's Case Presents a Substantial Federal Question.

In their answer to Question 2 propounded by the Court, the Firemen (Brief pp. 15-17) raise the question of the *substantiality* of the federal question here presented. They say that the Engineers' claim is so plainly without color of merit as to be unsubstantial, and hence the Court does not have jurisdiction. They do not assert that the question

presented is not a federal one, or deny that petitioner's claim involves the construction and effect of the Railway Labor Act and hence arises under 28 U. S. C. § 41(8) within the rules announced in *Gulley v. First National Bank*, 299 U. S. 109. It will be noticed that the M.K.T. Firemen's Committee stands alone among the parties to the engineers' cases now before this Court in questioning jurisdiction.[1]

The Firemen's argument in support of this point is without merit. There is no question but that petitioner is relying upon the Railway Labor Act for its rights, and that the rights asserted thereunder are valuable and substantial, and thus meet the first test laid down in *The Fair v. Kohler Die Co.*, 228 U. S. 22, 25, cited by the Firemen. As to the second test there prescribed, namely, whether the claim of right is frivolous, it is equally apparent that the Firemen's contention is without foundation. Here the right claimed by petitioner is the right conferred *by the Act* upon the designated representative of a given craft or class of employees to bargain exclusively with the carrier concerning the rules and working conditions applicable to the craft or class it represents. *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515, 548-549. The short and sufficient answer to this argument therefore is that a right thus recognized by this Court cannot, to say the least, be

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[1] In No. 41, the *Southern Pacific* case, where the same jurisdictional question is presented, the Southern Pacific Firemen's Committee not only fails to raise this objection but affirmatively takes the position that a declaration should be made on the mileage question on the basis of the presence of the federal question (Brief in No. 41, pp. 39-41). In the instant case the Carrier expressly states (Brief p. 9) that petitioner "alleged a substantial claim or right" under the Railway Labor Act, and concludes that the court has jurisdiction. Neither Circuit Court of Appeals found difficulty in entertaining jurisdiction, and it is significant that the Fifth Circuit Court, although holding against petitioner on the merits, nevertheless specifically upheld jurisdiction (R. 297, 132 F. 2d 91, 93).

without color of merit. We may add, however, that our reasons for believing that the right claimed by petitioner is conferred by the statute are developed further in the following discussion.

The Act Confers Upon the Designated Craft Representative the Right Exclusively to Contract the Collective Agreement Applicable to the Craft It Represents Free of Interference From Bargaining and Contract by the Representative of Another Craft on That Subject.

At pages 23-27 of their brief the Firemen argue that the Act affords no basis for petitioner's claim of the right exclusively to negotiate and contract the collective agreement concerning engineers' rules and working conditions. The argument proceeds to dissect the Act, and in the process to place an interpretation upon the provisions for craft bargaining contained in § 2 which would destroy the statutory plan. The narrowness of the view taken is at once apparent when it is seen that they interpret the second sentence of § 2, Fourth, as being designed only "to eliminate undemocratic control of a craft or class by a labor union representing only a minority." They dismiss § 2, Ninth, with the statement that it is an "admonition" to carriers to treat with the certified representative as the representative of the craft or class for the purposes of the Act.

The broad construction placed upon these provisions by this Court in the *Virginian R. Co.* case (300 U. S. at pp. 548-549), particularly with respect to the making of collective contracts, is thus entirely ignored. The Court there implemented the provisions of § 2, Fourth, for craft bargaining by the majority representative by holding that the obligation imposed upon the employer by § 2, Ninth, to treat, bargain and contract collectively with such representative *concerning the rates of pay, rules and working conditions of the craft it represents* is *exclusive*, and that

it could treat with no other representative concerning that matter.[1]

We have, heretofore pointed out that the prohibition against the carrier's treating with a representative other than the true one concerning the collective agreement governing a given craft, is as applicable and necessary in the case of interference by the representative of another craft as it is in the case of interference by a minority representative within such craft. This is because there can be only one contract applicable to a particular craft, and if a representative other than the duly designated one may contract for that craft the right of the craft itself (acting through its designated representative) to make its own rules is destroyed. It is plainly unnecessary, although the Firemen apparently contend to the contrary (Brief p. 24), that Congress should expressly specify that the command of § 2, Ninth, should apply to both types of interference. The prohibition is included by necessary implication.

The fact, referred to at page 29 of the Firemen's brief, that the injunction approved in the *Virginian R. Co.* case was directed at the interference caused by the car-

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[1] The court said (pp. 548-549):

"We think, as the Government concedes in its brief,[6] that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to *prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent* * * *." (Italics ours.)

Footnote 6 quotes the Government's interpretation as follows:

"When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i.e., a contract which sets rates of pay, rules, or working conditions), whether the contract covers the class as a whole or a part thereof. * * *"

rier's bargaining with a rival representative of employees who were within the craft or class does not render the construction of the Act there made inapplicable to a case such as ours. The Court gave broad and full consideration to the meaning and effect of the newly enacted doctrine of statutory craft bargaining and majority representation, as is apparent from its reference to the Government's views *amicus curiae* of the general application of the majority rule principle in the negotiation of collective contracts. The Firemen's quotation (Brief p. 29) from only a part of the opinion does not reflect the full sweep of the decision in its protection of the right of the majority representative exclusively to contract for the rules *applicable to its craft.*

At page 30 of the Firemen's brief and at page 26 of the Carrier's brief, the respondents contend that there has been no interference here with petitioner's right of exclusive representation of the engineers' craft. The Firemen put the argument thus: "*In entering into the Mediation Agreement the Firemen's Brotherhood did not assume to represent or act on behalf of the engineers' craft in the least degree.*" They, of course, disregard the fact that the Act, as construed by this Court, gives to the Engineers' Committee the exclusive right to contract collectively for the rules applicable to its craft. As shown in our initial brief, there is no question but that the rules contained in the Mediation Agreement are rules governing the engineers' craft. Such extra-craft regulation of engineers' rules, we submit, cannot be justified by the plea that the Firemen's Committee was merely bargaining on behalf of the firemen's craft.

At page 25 of their brief, the Firemen assert that by § 1, Fifth, of the Act Congress has denied any intention of legislating on the powers or jurisdiction of railway labor organizations. They say that Congress has thus declared that the jurisdiction or powers of *labor unions* organized or "joined" by crafts of employees are not to be regarded

as in any way limited or defined by the provisions of the Act. The labor unions thus referred to include the Brotherhoods or their respective "Adjustment" or "Grievance" Committees. As pointed out at page 49 of the brief of the United States, *amicus curiae*, in No. 48, the *Switchmen's Union* case, the Act would not prevent a given union from having "jurisdiction" or "power" to represent any craft which might designate it to be its representative. An example is the fact that the Brotherhood of Railroad Trainmen represents the different crafts of trainmen, yard foremen, and yardmasters on certain roads.[1] A labor union may include within its membership employees in several crafts, as in the case of the Brotherhood of Railway Clerks which is composed, among others, of clerks, freight handlers, express and station employees. A union like the old American Railway Union embracing all railway employees might be formed. The organization of System Federation No. 40 of the Railway Employees Department (A. F. of L.) on the Virginian Railway is a further illustration. As disclosed in the *Virginian R. Co.* case, this organization is a federation, composed of six system craft organizations comprised of men working in the crafts of machinists, boilermakers, blacksmiths, electrical workers, sheet metal workers, and carmen, with authority to contract collectively for these crafts as one class or unit. Thus, a labor union may be organized with whatever form or internal structure and with "jurisdiction" to represent as many crafts or classes of employees[2] as its membership may decide. "Jurisdiction" and "powers" are thus used in the sense of the authority to act within the organization.

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[1] See Eighth Annual Report of the National Mediation Board (p. 42), Table 14—Collective Labor Agreements and Employee Representation on 138 Selected Carriers.

[2] The exercise of such jurisdiction, of course, would depend upon the desire of a particular class or craft to have the union represent it.

These illustrations serve to make clear that the purpose and effect of § 1, Fifth, is to provide for freedom of organization of railroal employees and of labor unions. Employees are left free to organize into whatever crafts or classes they may desire.[1]

But while § 1, Fifth, thus leaves the employees untrammeled in the *organization* of such crafts or classes as they may desire and with whatever internal structure or form may be designated by them, it is not directed to the extent or manner of the *bargaining* which may be carried on by such employee organizations after they have been duly formed. The bargaining provisions of the Act are found in § 2.

The Firemen say (Brief p. 26) that by "jurisdiction or powers" the Congress must of necessity have meant the subject matter or field with respect to which a labor organization representing a craft of employees would normally assume to bargain on behalf of the craft.[2] We submit that the statement is erroneous.

To give this language the interpretation claimed by the Firemen would bring § 1, Fifth, into conflict with § 2, Fourth, and Ninth. By the 1934 amendments, Congress selected crafts or classes of employees as the appropriate bargaining units in the railroad industry, and gave to the representative of each such craft or class the exclusive right to negotiate the rules and working conditions appli-

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[1] *Switchmen's Union v. National Mediation Board*, 135 F. 2d 785, 801 (dissenting opinion).

[2] Elsewhere in their brief (pp. 34-36) the Firemen appear to admit that there are subjects or fields of exclusive jurisdiction which belong to a craft. They apparently do not contend that § 1, Fifth, prevents effect being given to exclusive jurisdiction concerning these subjects. And in No. 41, the Southern Pacific Firemen's Committee concedes (Brief, p. 25) that if a craft were seeking to make a contract regarding a subject in which its members had no interest or only a secondary interest, the court would be justified in holding such contract invalid if in conflict with a contract held by the craft having a direct and immediate interest.

cable to that craft. To read into §1, Fifth, an intention to permit the representative of one craft to negotiate with a carrier concerning the rules and working conditions of another craft, and thereby to require or permit the carrier to deal with two representatives concerning the latter's rules, would conflict with and destroy the intended effect of the 1934 amendments as construed by this Court in the *Virginian R. Co.* case. It was clearly not the intent of Congress in amending the Act to permit such dual or multiple representation. While it may be that prior to 1934, *because of the absence of majority craft rule*, any group of employees had free and unrestricted "jurisdiction" or "powers" to negotiate, such rights were taken away by the 1934 amendments, and new rights were given to crafts of employees (§ 2, Fourth, and Ninth) and new obligations were imposed upon carriers (§2, Ninth). Dual representation was rejected and abolished.

While we do not believe that §1, Fifth, was intended in the setting of the 1926 Act to provide for "unlimited" bargaining jurisdiction or powers of employee organizations—but was intended only to clarify in certain respects the right of self-organization—we submit that, even if it be contended that the former was its earlier effect, it can no longer be given that construction in view of the new and specific provisions in the 1934 amendments for exclusive craft representation and bargaining. The applicable rule is that in case of disharmony between new provisions and those re-enacted in the course of amendment, the new provisions prevail as the latest declaration of the legislative will. 1 *Sutherland on Statutory Construction* (3rd Ed. 1943, p. 430); *Virginian R. Co. v. System Federation No. 40, supra*, at p. 563.

In conclusion of this discussion, we point out that in the case at bar no question is presented as to the self-organization of the engineer and firemen employees. The two crafts of locomotive engineers and locomotive firemen are recog-

nized as separate crafts or classes of employees within the meaning of the Act. We submit that there is therefore no occasion for the application of § 1, Fifth, here.

The "Findings of Fact" Have No Effect in This Case.

The Carrier (Brief pp. 18-21) contends that this Court is bound by the findings of fact made by the trial court (R. 77-78). Reference to such findings, as set out at page 19 of the Carrier's brief, will disclose that each of them, except possibly Finding 3, is clearly and solely a conclusion of law. Finding 3 reads:

> "I find that the controversy between the plaintiff and the third party defendant as set out in the pleadings, and as disclosed by the testimony, is over a matter which effects both crafts."

Assuming that the controversy does affect both crafts, the question remains as to what the consequence of this fact is under the Railway Labor Act. The finding, we submit, is so indefinite as to be without value in answering this question.

At page 21*ff* of its brief, the Carrier attempts to translate Finding 3 as requiring the conclusion that the Firemen are "interested" in the dispute between the Engineers and the Carrier within the meaning of the term "interested" as used in § 2, Second, of the Act. This process requires the ascertainment of the extent and nature of the interest referred to in § 2, Second. It is our position, heretofore amplified, that in bargaining for the rules and working conditions of a particular craft the only interest which entitles a group of employees to negotiate collectively is the interest of the majority of that craft. Therefore, employees "interested in the dispute" as referred to in § 2, Second, if belonging to the minority or to another craft, even though they be affected by the rules negotiated by the majority, have no right of collective contract.

The Carrier's argument (Brief pp. 21-22), that the Act imposes the duty upon all carriers to settle *all* disputes, irrespective of how or out of what matters they arise, obviously cannot be extended to permit freedom to negotiate with *any* "interested" employees with whom the Carrier may be willing to negotiate. To place this construction upon the Act would, of course, defeat the principle of majority rule upon which the 1934 amendments were based. We think § 2, First and Second, may best be harmonized with § 2, Fourth and Ninth, by considering that Congress has chosen the method of bargaining exclusively with the designated representative of a craft respecting that craft's rules as the means most likely to succeed in attaining the objective of the prompt and *orderly* settlement of disputes over collective contracts (General Purpose (4)).

The Engineers' Rules in Force Prior to the Mediation Agreement Did Not Violate Seniority.

It is argued by the Firemen (Brief, pp. 10-12) that one of the purposes of the Mediation Agreement, particularly Items 1 and 3 thereof, was to re-establish the "simple principle of seniority." The Engineers do not agree that there was any conflict between the principles of seniority found in Article 43 of the Engineers' Schedule or Article 38 of the Firemen's Schedule and the rules concerning the calling of emergency engineers which had been agreed upon between the Engineers' Committee and the Carrier, or that under the seniority rules of either Schedule it was required that the senior available demoted engineer should be called to fill an emergency vacancy caused by the exhausting of the engineers' extra list. Of course, in any event, it is submitted that whatever the seniority rules in the Firemen's Schedule may be, they cannot fix the rules for the calling of men to perform service as engineers. The only service to be performed under the rules covered by Items 1 and 3 of the Mediation Agreement is engineers' service, not fire-

men's service. Therefore, it is engineers' seniority or the exercise thereof, not firemen's seniority, which is involved, and engineers should be called in accordance with the rules concerning engineers' seniority agreed upon between the Carrier and the Engineers' Committee. Seniority is not an inherent or statutory right or one created by operation of law. It is a contract right. *Hartley v. Brotherhood of Ry. & Steamship Clerks, etc.* (Mich.) 277 N. W. 885; *Capra v. Local Lodge No. 273 Brotherhood of Locomotive Firemen & Enginemen* (Colo.) 70 P. 2d 738; *Donovan v. Travers* (Mass.) 188 N. E. 705.

Seniority rules may differ as between railroads. Seniority rules on a particular railroad need not necessarily be uniform in all respects. Due to particular local conditions or unusual circumstances a modification in the general seniority rule may be deemed necessary in the interests of the craft. But whatever the reason therefor, modifications in the general seniority rule may be made by agreement between the carrier and the craft representative. In other words, the seniority rule for a craft is that which is agreed upon between the carrier and the craft representative. So here, when the Engineers' Committee and the Carrier agreed upon the rules concerning the calling of a demoted engineer for emergency service whose home terminal was at the point where the service was required or for the use of pool engineers when the extra board was exhausted, the resultant modification, if any, in the seniority rule was entirely proper and within the rights of both the Carrier and the Engineers' Committee. Since only engineers' seniority was involved only the Engineers' Committee and the Carrier could agree thereon. When the Firemen and the Carrier by the Mediation Agreement changed these rules so as to require the calling of the senior demoted engineer wherever found they were seeking to change rules governing engineers' seniority—a matter obviously not for negotiation with the Carrier by the Firemen. We submit that when a rule has been agreed upon between the Engineers'

Committee and the Carrier concerning the exercise of engineers' seniority in the performance of services in that craft it may not be changed or modified in any respect by agreement between the Carrier and the Firemen's Committee.

In connection with their argument that Item 3 of the Mediation Agreement was intended to correct a practice at Smithville which violated the fundamental requirements of the principles of seniority, the Firemen claim that under the engineers' rule the normal earnings of some of the pool engineers were greatly swelled. This claim is not supported by any reference to the evidence, and, in any event, does not infringe firemen's rights. They claim that Item 3 is justified because the total mileage allotted to the pool remained unchanged. But if it be true that some engineers might have had their earnings increased over the average such fact would not have been ground for complaint of any kind so long as the average of the earnings or mileage of all engineers made in the pool did not exceed the allowable maximum. Unless the average mileage for a given period of all of the men working in the pool reaches or exceeds the maximum, every demoted engineer, who is called in when the extra board is exhausted, takes away from the mileage available to pool engineers the amount of mileage which he runs in that emergency. Hence the earnings to which the engineers in the pool as a group are entitled are decreased by the amount of the earnings of the emergency engineers. Since the reason for the special rule at Smithville was that the engineers in the pool were not making their maximum mileage (R. 146-7) there is no ground for the claim that under the principle of seniority or under mileage regulations demoted engineers should be "accorded the opportunity" of performing service which had been allotted by the engineers to the pool engineers.

The statement of the Firemen (Brief, p. 13) that none of the three rules comprising the Mediation Agreement

regulates in the slightest degree the wages or working conditions applicable to engineers is patently untrue, as is shown herein and in our opening brief (pp. 51-63).

There is no Interest of the Firemen's Craft in Rules Concerning Performance of Services in the Engineers' Craft or Concerning Entry Thereinto or Removal Therefrom Which Entitles or Permits the Firemen's Committee to Treat or Contract With the Carrier Concerning Such Rules.

Neither the Carrier nor the Firemen's Committee in their answering briefs question the fact that there are two separate crafts. Both take the position that in entering into the Mediation Agreement the Firemen did not represent the engineers' craft but represented only the firemen's craft. The purported justification is that the Firemen are "interested" in the engineers' rules involved in the Mediation Agreement.

We think that the discussion by the Carrier's counsel concerning the Firemen's interest in the rules included in the Mediation Agreement is rather completely circumscribed by the position of the Carrier itself, where, as shown in our opening brief (pp. 15-19, 60-63), the Carrier definitely aligned itself with the view that the rules of the Mediation Agreement involve the service of engineers and not the service of firemen, and that the Carrier under the Railway Labor Act had the duty to treat only with the Engineers' Committee concerning them. "Interest" in a rule of the engineers' craft, in the sense that firemen may be affected thereby in connection with their desire for promotion to engineers' job or, as the Carrier puts it, in their desire to move from the left to the right side of the cab, which, as we understand, is the sense in which the word "interest" is used in the Carrier's brief, is not, as we have shown in our opening brief, such an interest as qualifies the firemen's craft to make the rules governing entry into the engineers' craft or the performance of services therein.

Reference is made by the Carrier (Brief p. 25) to the firemen's interest in the promotion rules in the Firemen's Schedule (R. 220-224). It will be noted that they provide for the qualification and eligibility for service as engineers. They do not purport to fix the time when actual promotion to engineer will take place, or when the establishment of a date of seniority as an engineer will be made. It is the Engineers' position, of course, that the Firemen cannot, by rules in their Schedule, fix the conditions under which firemen who have qualified themselves for promotion shall enter into the engineers' craft. Entry into the engineers' craft, whether upon original promotion or return from demotion or for service as emergency engineer, or otherwise, is to be determined under rules made between the Carrier and the Engineers. The Engineers are not here contending for the right to prevent the Carrier from agreeing with the Firemen that qualified firemen shall be eligible for employment as engineers if, as and when the services of additional engineers are needed. In the absence of contract to the contrary, the Carrier may employ whom it will for services as engineer. But the performance of services as an engineer is the exercise of engineers' seniority, and the rules governing the times when and under which engineers' seniority may be exercised are for agreement exclusively between the Engineers and the Carrier. The Engineers do insist that they alone have the right to agree with the Carrier on the rules as to when the promotion, or establishment of the engineers' date, shall occur by the performance of services as an engineer, and as to when additional engineers are to be placed upon the engineers' working lists.

There is no anomaly (Carrier's brief p. 24) in the position of the Engineers' Committee in this case growing out of the fact that there is in the Engineers' Schedule (Plaintiff's Exhibit 1, R. 96, 97; Article 44(a), R. 102) a provision to the effect that demoted engineers may displace junior

firemen, which provision is substantially identical with a provision in the Firemen's Schedule (Defendant's Exhibit 1, R. 214, Article 49(a), R. 218). Article 44(a) of the Engineers' Schedule was placed therein before the enactment of the Railway Labor Act. Prior to the 1934 amendment of the Act there was no legal requirement that the Carrier should treat and bargain only with the recognized craft representative concerning the rules governing its craft. Both the Engineers' and the Firemen's Schedules were entered into in 1918 while the Chicago Joint Agreement (hereinafter discussed) between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen was in effect. Each Schedule contained some provisions which relate to the other craft. But any and all provisions in either of the Schedules at the time the 1934 amendments become effective which conflict with such amendments must yield thereto. *Brotherhood of Railway Shopcrafts v. Lowden*, 86 F. 2d 458, 461 (Cert. denied, 300 U. S. 659). But irrespective of provisions which may be found in either Schedule concerning the other craft, it has been and is the position of the Engineers' Committee in this litigation that under the provisions of §2, Fourth, of the Railway Labor Act, as construed in the *Virginian R. Co.* case, *supra*, each craft has the exclusive right to contract with the Carrier for all of the rules governing its craft. It is clear, therefore, that the Engineers' Committee is not in an anomalous or inconsistent position concerning its contention that it has the exclusive right to bargain for all of the rules governing the engineers' craft.

It is argued by the Firemen (Brief pp. 34-37) that, although the crafts are separate and admittedly there are fields of exclusive jurisdiction belonging to each of the crafts, there is also a field of joint interest or overlapping jurisdiction between the two crafts. It is said that the matters of joint concern or overlapping jurisdiction are

limited to three (Brief p. 34): (1) The entrance of firemen into the engineers' craft through promotion; (2) the terms and conditions under which furloughed (demoted) engineers will be returned to firing service; and (3) the terms and conditions under which furloughed (demoted) engineers will be removed from firing service and returned to work as engineers. To support this contention of a field of overlapping interest the Firemen's Committee places much reliance upon the agreement known as the Chicago Joint Agreement (Third party Defendant's Exhibits 4, 5 and 6, R. 232, 233-254) entered into between the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen. It is argued, among other things, that, since in that Agreement the two Brotherhoods had formulated rules relating to the handling of the three matters above enumerated, they had recognized or agreed that there was a field of overlapping jurisdiction between the two crafts concerning them. We submit that the argument is not well founded, and that the Chicago Joint Agreement does not support it. That Agreement does not contain any acknowledgment that either craft had any right, jurisdictional or otherwise, or interest, in the other. On the contrary, it shows that the Brotherhoods expressly admitted that the crafts and their jurisdictions are separate and distinct. It was entered into in the course of conflict between the two crafts and not in a harmony of acknowledgment that either craft had an interest or jurisdiction in the other. It recognized that there was conflict concerning various matters between the two separate crafts, and it was entered into for the purpose of trying to settle amicably the clashes that were bound to occur. It was in the nature of a "noble experiment." First entered into in 1913 (R. 233), its impracticalities and its inability to solve the difficulties were discovered, and it was revised in 1918 (R. 237), and again in 1923 (R. 244), in attempts to make it workable. It was abrogated in 1927

by the Brotherhood of Locomotive Engineers because its futility had been more than proved.

That the Brotherhoods, in the Chicago Joint Agreement, neither admitted nor contemplated that there was a field of overlapping interest or jurisdiction between the two crafts is demonstrated by the first article thereof as follows:

> "We affirm the right to make and interpret contracts, rules, rates and working agreements for locomotive engineers shall be vested in the regularly constituted committee of the Brotherhood of Locomotive Engineers, and, conversely, the right to make and interpret contracts, rules, rates and working agreements for locomotive firemen and hostlers shall be vested in the Brotherhood of Locomotive Firemen and Enginemen." (R. 244.)

Clearly it appears therefrom that each recognized the separate jurisdiction of the other, and that the jurisdiction of the engineers' committees covered the field of contracts, rules, rates and working agreements for locomotive engineers, and that the jurisdiction of firemen's committees covered similar matters concerning firemen. The recognition and agreement of the separateness of the crafts and their respective jurisdictions was the fundamental and basic principle underlying the entire Agreement. Everything that follows, including the provisions dealing with the promotion of firemen to become engineers, the demotion of engineers to serve as firemen, and the conditions under which such demoted engineers would be returned to service as engineers, was entered into and agreed upon in the recognition of the fact that there were two separate crafts each with its own jurisdiction. There is no statement to be found in that Agreement which admits, or in any way recognizes, that there was a field of overlapping interest between the two crafts as to which both crafts had jurisdiction. The effort made by the two Brotherhoods in entering into the Agreement to compose the clashes and

conflicts arising between the two crafts cannot be tortured into an admission or recognition that either organization conceded that there was an intermediate field or zone in which both crafts had jurisdiction.

Under the contention of the Engineers' Committee in this case respecting the exclusive right of craft representation, it appears that the three subjects as to which overlapping jurisdiction is claimed by the Firemen, namely, entrance of firemen into the engineers' craft through promotion, terms and conditions under which demoted engineers will be returned to firing service, and terms and conditions under which demoted engineers are removed from firing service and returned to work as engineers, involve some matters which are within the exclusive jurisdiction of the engineers' craft and others within the exclusive jurisdiction of the firemen's craft. Thus, entry into the engineers' craft upon promotion from the firemen's craft, and the re-entry of demoted engineers into the engineers' craft after having been removed from firing service, are governed by engineers' craft rules. Re-entry into firing service, after demotion from service as engineers, and removal from firing service, are governed by firemen's rules. The Firemen may control the rules and conditions under which demoted engineers may enter, remain in, and leave the firemen's craft, but they cannot make rules which require that upon removal from the firemen's craft a demoted engineer shall be returned to service as engineer, or that firemen who are qualified for promotion to take positions as engineers shall be required, under conditions named by the Firemen, to enter the craft of engineers. The decision of the Circuit Court of Appeals for the Ninth Circuit in *General Committee of Adjustment of the Brotherhood of Locomotive Engineers, etc. v. Southern Pacific Co. et al.*, 132 F. 2d 194, supports these contentions. This position of the Engineers, we submit, is equitable and fair to all concerned. It is one of correlative rights for the two crafts.

Under it, the Engineers have the exclusive bargaining rights as to their craft and the Firemen have the exclusive rights as to their craft.

The fairness to both crafts of this position is not lessened by the claim of the Firemen (Brief, pp. 20, 21) that the interests of these crafts lie in opposite directions. While it is asserted, on the one hand, that the interests of the engineers lie in the employment at all times of as few engineers as possible,[1] and that the attainment of this objective requires an advancement of the maximum mileage limitations that have been applicable to engineers or the elimination of these limitations, and that, on the other hand, it is to the interest of the firemen's craft that the carrier be induced to support principles directly opposed to the asserted interests of the engineers, it will be noted that no claim is made that the Engineers are attempting or intend to change any mileage regulations. Should there be any attempted abuses either by firemen or by engineers arising out of the asserted different interests of the engineers and firemen concerning the spreading of engineers' work or the return of demoted engineers to firing service, each craft, under the position contended for by the engineers, has ample power to prevent encroachments by the other under the rules governing entry or re-entry into its own craft.

It is claimed by the Firemen, with respect to the three matters involved in their asserted field of overlapping jurisdiction, that the interest of the firemen therein is direct, immediate and financial. Direct, because of a lowering of firemen in their positions on the firemen's working lists when demoted engineers displace or "bump" firemen or

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[1] This is not true, for it is obviously to the interest of the engineers' craft that the amount of work available to the craft be divided among the members thereof so as to employ as great a number of engineers as is consistent with reasonable earnings for all.

in the improvement of the firemen's positions when demoted engineers return to work as engineers; immediate, because such situation may occur at any time; and financial, because a change in the fireman's position has an effect on his wages. We do not agree with this contention, because under the position of the engineers aforesaid the matter of entry of demoted engineers into the craft, and their removal therefrom, is for the control of the firemen's craft under its own rules. But assuming for the sake of argument that the firemen are affected directly or immediately or financially by the operation of the engineers' rules, it would not give to the Firemen the right to bargain for rules governing the engineers' craft. The interest of the minority of the craft of engineers is direct, immediate, and financial. But the minority has no right to bargain with respect to the rules which affect them directly, immediately and financially. No interest of men in the firemen's craft in engineers' craft rules can be as primary, direct and immediate as the interest of those actually employed in the craft. What the Firemen are contending for would have the effect of giving to the firemen's craft the right to bargain collectively for rules of the engineers' craft as to which the minority craft interest has no right of bargaining whatever.

Legally speaking, these two crafts are entirely separate and independent. Neither the fact that the carrier obtains most of its engineers from the craft of firemen, nor the fact that when engineers are demoted from service as such they re-enter into service in the firemen's craft, affects the separateness of the crafts. Such an arrangement may be one of practical convenience, but it is not a matter of legal significance. The fact that firemen desire promotion to the engineers' craft does not give the Firemen's Committee the right to make rules concerning entry thereinto; nor does the desire of engineers, upon demotion, to enter service in the firemen's craft give to

the Engineers' Committee the right to make the rules governing the entry into firing service. Persons working in one craft may desire to obtain employment in another, or persons not presently employed may seek employment in a craft, but, as we have pointed out in our opening brief, it is the craft into which admission may be desired, not those seeking admission thereto, which makes the conditions of entry thereinto. Neither personal interest, minority interest, economic interest, immediate, direct, or financial interest, is the criterion by which the right to bargain collectively for a craft is determined. The only interest which is established by the Railway Labor Act as the criterion for determining the right of collective bargaining concerning the craft rules is the interest of the majority of the craft.

The Mediation Agreement Does Not Import an Administrative Construction of the Railway Labor Act.

The Mediation Agreement is between the Carrier and the Firemen. The fact that it was made in the presence of two members of the National Mediation Board and was subscribed by them bestows no presumption of *prima facie* legality thereon. The primary function of the National Mediation Board is to endeavor to bring employees and carriers to agreement by mediation processes. The function of deciding questions of law has not been conferred upon it. What its views on the law may be, if they are expressed, have no binding effect. In any event, no views were expressed in this matter. When they appeared before the Board, the Carrier and the Firemen had opposing views concerning the right of the parties to enter into the Mediation Agreement, and in such situation the members of the Mediation Board could have acted as mediator without indicating any view as to the legality of either contention leaving the question of legality to be determined by the courts, where it belongs. We submit that the functioning

of the Mediation Board in the mediation process does not import any construction of the Act.

The administrative construction which courts recognize as of legal significance is such as originates in a bureau, department, or other instrumentality charged with the duty of administering and enforcing the law and rendering enforceable decisions in connection therewith, as for example, the Interstate Commerce Commission. Such a body has special facilities for investigation and administration and is empowered to render enforceable orders. Settled construction, the result of studied deliberation based upon "informed experience" over a period of years (*Illinois Central R. Co. v. I. C. C.*, 206 U. S. 441, 454) gives rise to administrative constructions which the courts recognize as entitled to great weight, and which will not be overturned except for cogent reasons. *United States v. Chicago, North Shore & Milwaukee R. R. Co.*, 288 U. S. 1, 13. We submit that nothing in the functioning of the Mediation Board in this matter even approaches the character of administrative construction which the courts consider as influential.

Conclusion.

For the reasons advanced herein and in our opening brief, the judgment of the Circuit Court of Appeals should be reversed and an appropriate declaratory decree should be entered.

Respectfully submitted,

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